

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNEST DEWITT CRY,

Defendant-Appellant.

UNPUBLISHED

June 27, 2006

No. 259901

Oakland Circuit Court

LC No. 04-197425-FC

Before: Bandstra, P.J., and Saad and Owens, JJ.

PER CURIAM.

The jury convicted defendant of armed robbery, MCL 750.529, assault with intent to rob while armed, MCL 750.89, and bribery of witnesses, MCL 750.122(7)(b), and the trial judge sentenced defendant to 12 to 30 years in prison for each conviction. We affirm.

I. Directed Verdict and Sufficiency of the Evidence

Defendant argues that the trial court erred when it denied his motion for a directed verdict and that the prosecutor presented insufficient evidence to support his armed robbery and assault with the intent to rob while armed convictions. We disagree.

“When reviewing a trial court’s decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt.” *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Further, “[w]hen a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt.” *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2003).

The elements of armed robbery are: (1) an assault, and (2) a felonious taking of property from the victim’s presence or person, (3) while the defendant is armed with a specified weapon or any article used or fashioned in a manner to lead the person assaulted to reasonably believe it to be a dangerous weapon. *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004); MCL 750.529. An assault is an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Abraham*, 234

Mich App 640, 657; 599 NW2d 736 (1999). “The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant’s being armed. Because this is a specific-intent crime, there must be evidence that the defendant intended to rob or steal.” *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). In order to prove the intent to rob element, the prosecution must show that at the time of the assault, the defendant intended to permanently take money or property from complainant; it is not necessary for the defendant to actually take any money or property from complainant. *People v Garcia*, 448 Mich 442, 482; 531 NW2d 683 (1995).

Here, both victims testified that, after a sexual encounter with defendant, defendant pointed what they believed to be a real gun at them and commanded them to take off their clothes, lie on the ground and hand over their jewelry. The victims both stated that they were scared and gave their jewelry to defendant because they thought defendant would shoot them if they did not do so. Brandi testified that after he saw an opening and jumped defendant, defendant fought back and hit Brandi with the gun, then fled. Brandi did not recover the \$500 bracelet, and a recorded telephone conversation revealed that defendant told the victims he would give them the bracelet back, in addition to some money, if they would refuse to testify against him.

The victims’ testimony was also corroborated by evidence that, when the victims went to search for Brandi’s bracelet at the scene of the incident the next day, the victims found a broken toy gun. Contrary to defendant’s assertion, regardless whether one of the victims fought back when he saw an opportunity and that the victims searched for defendant after the crime, does not negate the fact that the victims were fearful of defendant at the time he pointed a gun at them and demanded that they give him their jewelry. On the basis of the evidence presented, a rational trier of fact could conclude that the essential elements of armed robbery and assault with the intent to rob while armed were met. *Ford, supra*, p 458; *Akins, supra*, p 554; *Abraham, supra*, p 657. Thus, the trial court properly denied defendant’s motion for a directed verdict. *Werner, supra*, p 530.

On the basis of this evidence, we also reject defendant’s assertion that the prosecutor presented insufficient evidence to convict him armed robbery. Clearly, the jury accepted the victims’ testimony with regard to defendant’s actions and, on appeal, we afford deference to the jury’s special opportunity and ability to determine the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

II. Sentence

Defendant also says that his 12-year minimum sentences are disproportionate to their respective offenses, and thus, violate his constitutional protections against cruel and unusual punishment. We disagree. Generally, we review the imposition of a sentence for an abuse of discretion, but because defendant failed to properly preserve the issue by making an objection at sentencing, our review is limited to whether there was plain error which affected substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

The sentencing guidelines apply to any enumerated felony committed on or after January 1, 1999. *People v Hendrick*, 472 Mich 555, 557; 697 NW2d 511 (2005); MCL 769.34(2). Under the sentencing guidelines act, a court must impose a sentence in accordance with the

appropriate sentence range. *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001); MCL 769.34(2). Thus, if a minimum sentence is within the appropriate sentencing guidelines range, we must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); MCL 769.34(10). The statutory sentencing guidelines are presumptively proportionate. *People v McLaughin*, 258 Mich App 635, 669-671; 672 NW2d 860 (2003). A sentence within the guidelines range or which is proportionate to the offense and the offender does not constitute cruel or unusual punishment. *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004).

Here, it is undisputed that defendant's minimum sentences are within the properly calculated guidelines range. Therefore, defendant's minimum sentences are presumptively proportionate and do not constitute cruel or unusual punishment. *Drohan*, *supra*, pp 91-92; *McLaughin*, *supra*, pp 669-671.¹

Affirmed.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Donald S. Owens

¹ Further, defendant does not suggest that the guidelines were improperly scored or that the trial court relied on inaccurate information in determining his sentences. *Kimble*, *supra*, p 309; MCL 769.34(10).